From: **John Michaud/DC/USEPA/US**
Sent: 2/22/2012 10:11:10 AM

To: Lee Tyner/DC/USEPA/US@EPA
CC:
Subject: Fw: Fracking article

Lee --

Do you have the final or a late draft of the 1/19 Action Memo?

Thanks.

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To: John Michaud/DC/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, Mary Andrews/DC/USEPA/US@EPA, James Bove/DC/USEPA/US@EPA
Date: 02/22/2012 09:44 AM
Subject: Fracking article

I found this pretty interesting. Does anyone happen to have a copy of the Jan 19th action memo cited below (in highlighted text)?

Industry Resists EPA's Superfund Investigation Of Alleged Fracking Leak

Posted: February 21, 2012

Industry groups are resisting EPA's use of Superfund law authority to investigate groundwater contamination the agency says could be due to hydraulic fracturing of natural gas, a push that could hobble its efforts to use enforcement authority to address drilling releases after a federal court appeared ready to raise the bar on its use of drinking water law authority.

Sources say EPA's efforts to use Superfund authority to investigate alleged contamination from fracking may face evidentiary hurdles in part because the law exempts petroleum and related substances, including natural gas, from regulation -- forcing EPA to prove that hazardous substances, many of which are naturally occurring, stem from fracking operations.

For example, in a Pennsylvania case where EPA is using Superfund authority to investigate alleged fracking contamination, drillers are challenging EPA analysis of inorganic arsenic in sampled wells, saying the agency's reading may be a transcription error resulting in a false positive.

EPA in two recent cases, Dimock, PA and Pavillion, WY, has begun using various authorities in the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) to investigate contamination alleged to have come from fracking operations.

In the Pennsylvania case, for example, the agency is using its authority in CERCLA 104 (a) to require sampling of drinking water wells and provide alternate drinking water to residents after finding that arsenic and other substances were present in a drinking water well above drinking water standards.

Energy industry sources say EPA's use of its CERCLA authority appears aimed at preserving the agency's ability to bring enforcement actions, one of the few tools that EPA has to address fracking operations, after federal appellate judges -- hearing arguments in *Range Resources v. EPA*, a case involving contamination alleged to stem from drilling wells -- questioned agency claims that the drinking water law limits judicial review of preenforcement actions.

The judges' indications cast doubts on agency plans to use emergency authorities in the Safe Drinking Water Act (SDWA) and Resource Conservation and Recovery Act (RCRA), one of the few tools EPA has to oversee fracking operations while it gathers data and crafts rules to regulate the practice.

For example, EPA officials told an Energy Department advisory panel last year that RCRA and SDWA enforcement actions to ensure compliance with existing environmental laws are one of five prongs of its broader strategy to regulate fracking operations absent new statutory authority.

"Industry is seeing the writing on the wall here," one source says of EPA's use of CERCLA. "If [EPA enforcement officials go] down one route and don't get the outcome they like, they'll switch to another."

But industry sources say EPA faces legal hurdles in its use of CERCLA authority. While actions taken under Superfund are generally shielded from judicial review, industry sources say the law also constrains EPA's ability to address harmful releases in part because the law exempts petroleum and related compounds, including methane, from agency oversight.

This leaves the agency to regulate "hazardous substances" that may stem from fracking operations, though this may be more difficult to regulate than the "contaminants" EPA can regulate under SDWA and "hazardous waste" that can be regulated under RCRA.

"They're hemmed in with the definition of hazardous substance -- they can't use methane" because it fits into the definition of a constituent of petroleum -- long exempt from the Superfund law, and has no known human health impacts in water, one attorney source says. "They're walking a thin line because it's all naturally occurring."

Still, some industry sources also say that energy companies may be hesitant to push back against the agency's use of authority under CERCLA than other environmental statutes because of the public relations implications of opposing an action under Superfund, which is widely known as a cleanup statute.

Remedial Action

While the agency has yet to use CERCLA to initiate any kind of remedial action, industry and some state regulators are concerned that EPA could eventually begin doing so, one state source says. The concern is that if EPA is using CERCLA now to justify groundwater investigations and provide alternate drinking water, it may eventually try to use it for "cleanup and deep pocket issues," the source says, adding that the agency's approach is legally "tenuous" but will likely take a formal challenge to curtail.

In the Dimock, PA case, Cabot Oil and Gas Corporation, whose drilling activities the agency has suggested may be to blame for the contamination, has challenged EPA claims that inorganic arsenic present in drinking water wells provides the agency with authority under CERCLA to investigate, according to press reports.

The company was responding to EPA's Jan. 19 action memorandum allowing Region III to undertake additional sampling activities at approximately 61 homes in Dimock Township, PA, in which the agency acknowledged potential legal limits due to exemptions in the major environmental statues, including CERCLA, SDWA and RCRA, for the oil and natural gas industry.

The memorandum pointed to a list of "hazardous substances" and other non-CERCLA regulated contaminants that industry data indicated was detected in the four wells, including Bis(2-ethylhexyl)phthalate, sodium, manganese and glycol. But the only compounds found that appear to exceed hazard levels are manganese, arsenic and sodium, the memo says. "A number of home wells in the Dimock area [of Pennsylvania] contain hazardous substances, some of which are not naturally found in the environment," the memo says, adding that "Inorganic hazardous substances are present in four home wells at levels that present a public health concern."

One industry attorney says EPA may be on solid ground in seeking to address inorganic arsenic because the substance is not naturally occurring in underground rock formations, and the agency's initial findings, based on industry data, indicated that levels detected in the well exceeded the maximum contaminant level (MCL) for the metal.

EPA's memo says it found that arsenic was detected at levels of 37 micrograms per liter (ug/L), exceeding the drinking water standard of 10 ug/L for the substance, though the findings were based on data submitted by Cabot.

But with Cabot challenging the agency's arsenic finding, the agency may not be on a solid footing. "If EPA loses on arsenic, it will have a really hard time -- it's a high bar to show that [other contaminants] are not naturally occurring" the industry attorney says. "From a scientific data perspective CERCLA makes it harder to show" that fracking fluid is actually responsible for the contamination.

The industry group Energy in Depth (EID) also highlighted Cabot's claims on the arsenic levels, saying in a Feb. 1 blog post that EPA's "premise for taking Superfund action was largely one based upon the presence of arsenic that doesn't exist at the levels suggested."

EID is also challenging EPA's inclusion of sodium as a basis for its use of CERCLA section 104(a), saying there is no enforceable agency standard for sodium, and that the level of concern the agency cites in the memo, 20,000 ug/L, is a secondary MCL and a draft version at that.

"I'm pretty sure that EPA wouldn't have been able to use the "hazardous release" provision under Superfund as the means to nose its way into Dimock without the elevated read-outs of arsenic. Sodium and manganese wasn't going to get them where they wanted to go -- neither of those things has primary MCLs," a second industry source says. -- *Bridget DiCosmo*